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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PHYLLIS C. SWANGER, Executrix of the
Estate of Carl Swanger, Jr., Deceased - **Petitioner,**

VERSUS

THE MUTUAL LIFE INSURANCE COM-
PANY OF NEW YORK, - - - **Respondent.**

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Whether, in applying Kentucky law to this action based upon diversity jurisdiction, a contract for temporary life insurance was created upon delivery of the application, which included a medical questionnaire, and payment of the premium to the insurer's licensed agent, pursuant to the solicitation brochure and receipt dated June 12, 1978?

PARTIES TO THE PROCEEDING

PETITIONER,

Phyllis C. Swanger, Executrix of the Estate of Carl Swanger, Jr., Deceased,

RESPONDENT,

The Mutual Life Insurance Company of New York.

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October Term, 1982

No. _____

PHYLLIS C. SWANGER, Executrix of
the Estate of Carl Swanger, Jr.,
Deceased, - - - - - - *Petitioner,*

v.

THE MUTUAL LIFE INSURANCE COM-
PANY OF NEW YORK - - - *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

STATEMENT OF JURISDICTION

On August 16, 1982, the Court of Appeals for the Sixth Circuit affirmed the Judgment entered by the Court for the Eastern District of Kentucky sustaining the respondent's motion for summary judgment. (Appendix, p. 19).

A timely petition for rehearing, filed with the Court of Appeals, was denied on September 16, 1982. (Appendix, p. 29).

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On a group life solicitation,¹ petitioner's husband, hereinafter referred to as applicant, applied for term life insurance in the amount of \$150,000. The solicitation brochure provided:

"All coverage is subject to approval by MONY. If your application is approved without further requirements, *your insurance will become effective as of the date your application and premium were received by the Plan Administrator.* If you are required to furnish any additional evidence of insurability over your own signature, (which may include a medical examination at MONY's expense), your coverage, if approved, will become effective as of the date you furnished final evidence of insurability satisfactory to MONY." (Emphasis added). (Appendix, p. 33).

Pursuant to the instructions of the solicitation, the applicant submitted the completed application, which included a medical questionnaire, and his draft, representing the semi-annual premium, to the respondent's licensed agent on June 2, 1978. On June 12, 1978, the

¹The solicitation was administered by Daniel's Head Inc., a licensed agent for the respondent, MONY. MONY was responsible to see that Daniel's Head was properly licensed by the various states in which it operated. Daniel's Head marketed the approved plan, billed and collected premiums, did routine customers service work, assisted MONY in getting various underwriting requirements and held the premium payments submitted by the applicants in an account for distribution as directed by the respondent, MONY. Daniel's Head acted as a general agent for MONY, except that it was not authorized to formally approve or underwrite a policy of insurance.

respondent's licensed agent mailed to the applicant a receipt notifying the applicant that it had received his application and semi-annual premium payment which would be held in a special account pending review by the insurer.² However, the application and premium payment were thereafter delivered by the agent to the respondent, MONY.

On June 27, 1978, the respondent, at its New York office, mailed a letter to the applicant *requesting* a medical examination. The applicant received the request shortly thereafter. The respondent's letter did not expressly or specifically notify the applicant that the successful completion of a medical examination was a condition precedent to creation of a contract for temporary insurance pending formal acceptance by the respondent.

On July 4, 1978, the applicant died as a result of injuries sustained in an automobile accident. Although the applicant did not take the requested medical examination, it is unquestioned in the record that he was in insurable health at the time of his death.

²There were no provisions in the solicitation brochure or application regarding the conditions of the special account. Mr. Joe Ferguson, account manager for the respondent's licensed agent, Daniel's Head, testified, by deposition, that it held the premium payments for disbursement as directed by the respondent, MONY. He testified that as a matter of practice, the premium payments were removed from the special account and paid to the respondent, MONY, only after approval of application or were directly refunded by the agent upon rejection or withdrawal of application. However, the applicant's premium payment herein was in fact removed from the special account and paid to the respondent, MONY.

On August 26, 1978, the petitioner timely filed with the respondent, through its licensed agent, a completed claim for death benefits in the amount of \$150,000. However, the respondent rejected the claim and instead tendered to the petitioner a draft in the amount of \$10,150., representing the guaranteed benefits of \$10,000. and a partial return of semi-annual premium payment previously tendered by the applicant of \$150.

This case was initially filed by the petitioner in the Lee Circuit Court, Beattyville, Kentucky, on July 2, 1979, but was removed to the United States District Court for the Eastern District of Kentucky by petition of the respondent on August 3, 1979. Jurisdiction was invoked under 28 U.S.C. §1332. This case was submitted to the court upon motions for summary judgment filed by both parties hereto. The court, applying basic contract law rather than Kentucky state law, held that the respondent did not accept the offer to purchase insurance as *acceptance was made contingent upon completion of the medical examination and return of the medical report*. The Court overruled the petitioner's motion for summary judgment, sustained the respondent's motion for summary judgment and awarded the petitioner the sum of \$10,000. (Appendix, pp. 23-28). The court amended its judgment on August 5, 1981, and awarded the petitioner the sum of \$10,150. representing \$10,000. of guaranteed life insurance and \$150. return of premium tendered. (Appendix, pp. 20-21).

On August 28, 1981, the petitioner timely filed a notice of appeal. On August 16, 1982, the judgment of the district court was affirmed by the Court of Ap-

peals for the Sixth Circuit. (Appendix, p. 19). The petitioner's timely petition for reconsideration was also denied on September 16, 1982. (Appendix, p. 29).

REASONS FOR GRANTING THE WRIT

1. It is imperative that the issues raised in Question 1 be answered because there is a conflict in the approach taken by the Federal Court of Appeals and the Supreme Court of Kentucky in interpreting conditional receipts for life insurance. The consequence is that the insurance industry can indirectly avoid state regulation of its practices by appealing to the federal courts for interpretation of conditional receipts and thereby frustrate the state in the proper regulation of its insurance industry for the protection of its insurance buying citizens.

A. The Solicitation Brochure, Prepared at the Direction and With the Approval of the Insurer, Coupled with the Receipt Notification of Application and Premium Paid, Constitute a Conditional Receipt Creating a Temporary Contract of Insurance.

A conditional receipt is a statement between the insurer and the applicant which acknowledges receipt of the application and prepayment of the premium, and is construed as creating temporary insurance pending issuance of the formal policy. 12 Appleman, *Insurance Law & Practice* §§7221-7233 (1943). Courts have generally held a receipt of temporary insurance effective where there is a statement sufficient to determine the protection for which the parties contracted and

consideration has passed. No definite terms or particular form of phraseology need be used in order to effectuate a receipt for temporary insurance. *Couch on Insurance* 2d, §§14:26-14:46 (1959). Nor must the receipt be written to be effective. *Appleman, supra; Couch, supra*. The court in Kentucky recognizes the validity of the conditional receipt. *Investor's Syndicate Life Insurance and Annuity Company v. Slayton, Ky.*, 429 S. W. 2d 368 (1968).

The petitioner submits that the solicitation brochure, prepared at the direction and with the approval of the insurer, coupled with the receipt notification of application and premium paid, dated June 12, 1978, constitute a conditional receipt and afforded temporary life insurance, under the circumstances of this case, pending acceptance or rejection of the application. The solicitation brochure provides:

"All coverage is subject to approval by MONY. If your application is approved without further requirements, your insurance will become effective as of the date your application and premium were received by the Plan Administrator. If you are required to furnish any additional evidence of insurability over your own signature, (which may include a medical examination at MONY's expense), your coverage, if approved, will become effective as of the date you furnish final evidence of insurability satisfactory to MONY." (Appendix, p. 33).

This language, coupled with the receipt notification of application and premium, delivered to the applicant by

the insurer's licensed agent, constitute a conditional receipt. There is a statement which is sufficient to determine the protection for which the parties contracted, by reference to the solicitation brochure and the amount of premium paid, and consideration is present in the form of the prepayment of the premium. It cannot be denied that this provision contemplates that the "insurance will become effective as of the date your application and premium were received by the Plan Administrator," under certain circumstances. This language, in and of itself, demonstrates that this is a conditional receipt affording temporary insurance prior to the issuance of the formal policy.

Additionally, the provision in the solicitation brochure is the same or similar to that which has been recognized by numerous courts as effectuating a conditional receipt affording temporary insurance. In *Puritan Life Insurance Company v. Guess, Ak.*, 598 P. 2d 900 (1979), the conditional receipt provided:

"Insurance under the terms of the policy applied for and subject to the limits specified below shall take effect as of the date of the application or the policy date requested in the application, whichever shall be the later, or the last of any medical examinations or tests required under the rules and practices of Puritan Life or the date of this payment, whichever shall be later. . . ." (at p. 902).

The import of this language is the same as the language between the parties in the present case. Also, in the cases of *Meding v. Prudential Insurance Company of America*, 444 F. Supp. 634 (N.D. Ind. 1978), *Collister*

v. Nationwide Life Insurance Company, Pa., 388 A. 2d 1346 (1978), *Smith v. Westland Life Insurance Company, Cal.*, 439 P. 2d 479 (1975), and *Tripp v. Reliable Life Insurance Company, Kan.*, 499 P. 2d 1155 (1972), the courts found that temporary insurance was created prior to formal issuance of the policy under conditional receipts which employed language similar to that between the parties hereto.

Admittedly, the provision in the solicitation brochure does not state in bold type "THIS IS A CONDITIONAL RECEIPT." Nevertheless, courts, in interpreting conditional receipts have demonstrated a reluctance to rigidly construe the written terms of the receipt and have, instead, focused upon the dynamics of the transaction as the determining factor. More importantly, the solicitation brochure does not state in bold type "THIS IS NOT A CONDITIONAL RECEIPT" or "NO TEMPORARY INSURANCE IS AFFORDED." Therefore, the petitioner submits that the language of the solicitation brochure coupled with the receipt notification of application and premium paid, constitute a conditional receipt. If not, then its classification is inexplicable.

B. Interpretation of Conditional Receipts.

Courts have adopted two opposing views in confronting the issue of the interpretation of conditional receipts. The first view, known as the condition precedent view, is based upon the theory that the application for insurance is an initial step; that the absolute right to accept or reject such application is with the insur-

ance company; and that until there is an actual acceptance, there is no contract of insurance. *Meding v. Prudential Insurance Company of America, supra*. In application of this approach, the court rigidly interprets the language of the receipt under general contract law unless it finds the language to be ambiguous. *Rohde v. Massachusetts Mutual Life Insurance Company*, 632 F. 2d 667 (6th Cir. 1980). This was the approach employed by the district court in its order and judgment and the appellate court in affirming that order.

The second view, known as the condition subsequent view holds that a contract of temporary insurance is created as of the date the insurer accepts the application and the prepayment of the premium. *Kaiser v. National Farmers Union Life Insurance Company, Ind.*, 330 N. E. 2d 599 (1976) and *Smith v. Westland Life Insurance Company, supra*. Under the condition subsequent view the insurance carrier is liable for benefits, subject to its right to reject, as of the date of the application, if, upon reasonable grounds, the applicant was not insurable on that date. *Meding v. Prudential Insurance Company of America, supra*. All conditions contained in the receipt are conditions subsequent to the creation of the contract for temporary insurance. *Kaiser v. National Farmers Union Life Insurance Company, supra*. Rather than focusing upon the strict language of the receipt, the court focuses upon the dynamics of the transaction to ascertain and effectuate the reasonable expectation of the applicant, recognizing that a conditional receipt is a contract of adhesion and, as such, should be construed to provide

the coverage which a lay person would have reasonably expected. *Collister v. Nationwide Life Insurance Company, supra*. It is not necessary that the language of the receipt be ambiguous in order to avoid rigid interpretation of the receipt. *Puritan Life Insurance Company v. Guess, supra*.

In *Puritan Life Insurance Company v. Guess, supra*, an attorney, upon solicitation, agreed to purchase a life insurance policy for \$100,000. and, pursuant to the instructions by the insurance agent, completed an application for insurance and tendered to the agent the first premium payment.^a Upon submission of the application, the applicant was informed that he would be required to have a medical examination before coverage would become effective. The applicant died one day later without taking the required medical examination and the insurance company refused payment to his beneficiary. Nevertheless, the court held that a contract for temporary life insurance had been created as of the date the application and payment of the premium were tendered, subject however, to the right of the insurer to terminate coverage if it later found the applicant uninsurable. Although noting that the applicant had been told that he would be required to take a medical examination, the court held that such notification was insufficient to avoid temporary coverage because the agent failed to inform the applicant that the taking of the medical examination was a condition

^aThe conditional receipt herein is set out on page 7, *supra*.

precedent to the creation of a contract for temporary life insurance.

Similarly, in *Meding v. Prudential Insurance Company of America, supra*, the applicant died two days after completing the insurance application and payment of the first premium but before he completed the required medical examination. There, the court held that a temporary life insurance contract was created once the insurer had received consideration, in the form of the prepayment of premium, which was effective until the insurer had approved or rejected the applicant during his lifetime. The court held that the requirement of a medical examination contained in the receipt, was a condition subsequent, rather than precedent, to the creation of the contract for temporary insurance. The court reasoned:

“ . . . an insurer cannot accept a premium from an applicant, who has completed the insurer's own application and received complicated and legalistically phrased receipt, giving the applicant reason to believe he is insured, and then disclaim insurance liability for the interim period because it is not satisfied that the applicant was an insurable risk. To allow insurers to disclaim liability during the interim period before acceptance or rejection of applicants would enable insurance companies to collect premiums for a period during which there was in fact no insurance, and consequently no risk involved. In short, there is no *quid pro quo*. For, if it is the insurance company's purpose, by securing the payment of a premium, to attempt to minimize the chances of an applicant's changing his

mind or applying to another company for insurance during the time his application is pending, then such a person is entitled to protection during that time. Moreover, once it is determined that the applicant is an acceptable risk, the usual practice of the insurance company is to back-date the policy and make it effective as of the date on which the prepayment receipt was issued." (at pp. 636-637).

In *Collister v. Nationwide Life Insurance Company, supra*, wherein the applicant died after completion of the application and payment of the first premium but prior to the taking of a medical examination required by the wording of the conditional receipt,⁴ the court held that the insurer was liable for the full amount of policy applied and paid for by the applicant based upon

⁴The conditional receipt provided:

If the sum indicated above equals the first full premium payment basis selected in the application for the insurance applied for and if the following acts are completed, (a) receipt by the Company of a fully completed application which includes fully completed medical examination, if any required by the Company's published underwriting rules because of the age of the insured or the amount of insurance applied for and (b) completion of all investigation by the Company and the Company is satisfied that the Proposed Insured and (without prejudice to the Proposed Insured) each person proposed for coverage under the Family Rider or the Children's Rider (whichever is applicable and if applied for) is insurable and qualified under the Company's published rules, limits and standards on the plan and for the amount applied for and at the premium specified herein, the said insurance shall take effect and be in force subject to the provisions of the policy applied for from the date of last medical examination, or if no medical examination is required, the insurance shall take effect on the application date unless all acts required are completed, no insurance shall take effect hereunder." (at p. 1356).

a contract for temporary insurance created upon payment of premiums. The court reasoned that the public has a right to expect that they will receive something of comparable value in return for the premium paid. The court further stated:

“Courts should also keep alert to the fact that the expectations of the insured are in large measure created by the insurance industry itself.” (at p. 1353).

“The very acceptance of an advance premium by the carrier tends naturally toward an understanding of immediate coverage though it be temporary and terminable. To the ordinary layman payment of the insurance premium constitutes payment for immediate protection.” (at p. 1351).

In *Tripp v. Reliable Life Insurance Company*, *supra*, the plaintiff completed an application for a family-plan life insurance policy and, at a later date, paid the initial premium.⁵ Prior to the insurer's taking action on the application, the plaintiff's minor

⁵The conditional receipt provided:

“ . . . The insurance under the policy for which application is made shall be effective on date of this receipt or the date of completion of the medical examination (if, and when required by the Company), whichever is the later date, if in the opinion of the authorized Officers of the Company at its Home Office in Webster Groves, Missouri, the Proposed Insured is insurable and acceptable for insurance under the rules and practices on the plan of insurance. . . .

Company shall have 60 days from date of application to consider and act upon the application. Failure of the Company to offer a policy within such 60 days shall be deemed a declination,” (at pp. 1156-1157).

daughter was killed by accident and the insurance company refused payment to her beneficiary. The court nevertheless held that "when an application for life insurance is made and the company receives the initial premium and issues a receipt therefor, a policy of temporary insurance is created and said policy of temporary insurance continues in effect until the insurance company declines the application, notifies the insurer, and returns the premium. . . ." (at p. 1159). Any other interpretation of the conditional receipt would permit the insurance company to reject an application solely on the basis that loss had occurred prior to formal acceptance, which, the court stated, they could not support.

Kentucky courts have, of longstanding, echoed the rationale given by the various courts which have adopted the conditional subsequent view in interpreting insurance contracts. In *Continental Insurance Company v. Haynes*, 10 Ky. Law Rep. 276, the court recognized that the payment of the premium gives the applicant the reasonable expectation of immediate coverage. It stated:

"The premium is the price paid for indemnity and is earned as soon as the risk attaches; the converse is and ought to be true that protection is purchased so soon as the rate is fixed and agreed upon and the premium paid to one authorized to receive it. It is to be assumed that the company will accept that risk, if advantageous to it, which it must be, if fairly and honestly contracted for because that is the business in which it is engaged, and therefore

to allow it under the reservation of the right to approve, to reject simply because a loss has occurred would destroy the mutuality of the contract, and afflict upon one party the misfortune he had provided against."

In *Indiana Life Insurance Company v. Maines*, 191 Ky. 309, 230 S. W. 54 (1921), the court citing *Continental Insurance Company v. Haynes*, *supra*, held that an insurance company will not be allowed to reject an application for insurance for the sole reason that the applicant had died or loss had occurred before action was taken thereon where it is shown that but for the death or loss the application would have been accepted and the policy issued.

In *Pennsylvania Life Insurance Company v. McReynolds*, Ky., 440 S. W. 2d 275 (1969), the court recognized that because an insurance contract was one of adhesion, the focus in interpreting a conditional receipt, should be placed on the dynamics of the transaction, and not the specific contract language, to ascertain and effectuate the reasonable expectations of the applicant.

More recently, in *Investor's Syndicate Life Insurance and Annuity Company v. Slayton*, *supra*, the Kentucky court acknowledged its acceptance of the condition subsequent view. Therein, the applicant applied for life insurance, paid the first premium, and

received a conditional receipt.⁶ The applicant was killed by accident, on the same date on which his application arrived at the insurer's home office and the insurer refused payment to the beneficiary. Although the court found for the insurance company, on other grounds, it stated that a conditional receipt creates a contract of preliminary insurance with the reserve right in the insurer to thereafter determine, in good faith, the applicant's insurability. Only when the applicant is determined not to have been an insurable risk at the time of the application is the insurer not liable for a death that occurred during the period covered by the receipt.

Therefore, in applying Kentucky law to this Kentucky case the Petitioner submits that a contract of temporary insurance was created on the date of the receipt of application and premium paid subject, however, to the insurer's right to determine, in good faith, the applicant's insurability on that date. The condition contained in the solicitation brochure of a medical examination, if required, was, under Kentucky law, a condition subsequent to the creation of a contract of temporary insurance. Under the ruling in *Indiana National Life Insurance Company v. Maines, supra*,

⁶The conditional receipt provided:

"The insurance shall be effective as of the date of this receipt or the date of completion of medical examination ordinarily required by the company, whichever is later, if Company at its home office shall be satisfied that on said date the person or persons proposed for insurance were in good health and insurable on the plan applied for, and at the premium rates stated in the application." (at p. 370).

loss alone is not a good faith determination of insurability. Rather, the insurer must determine whether on the date of the receipt the applicant was in insurable health. It is not denied in this case that the applicant, Carl Swanger, Jr., was in insurable health on June 12, 1978, the date of the receipt.

Jurisdiction of the federal court in this case was based upon diversity of citizenship, which required the courts below to apply Kentucky law, including case law, in interpreting the solicitation brochure and the receipt notification of June 12, 1978. *Erie Ry. Co. v. Thompkins*, 304 U. S. 64 (1938). However, the district court and Court of Appeals rejected Kentucky law and erringly employed the condition precedent view concluding that there was no contract for temporary insurance because the applicant had failed to undergo a medical examination which, in their interpretation, was a condition precedent to the creation of a contract for temporary insurance. The courts' failure to apply Kentucky law, and specifically the condition subsequent view, results in a state of divergent or conflicting laws, one to be applied in the state courts and the other to be availed of in the federal courts. This frustrates the state's regulation of the Kentucky insurance industry and supplants state regulation with federal intervention in all cases involving foreign insurance companies. It is well settled that the states are empowered with the authority to regulate their respective insurance industry for the protection of their insurance-buying citizens. *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946); *Merchant's Mutual*

Automobile Liability Ins. Co. v. Smart, 267 U. S. 126 (1925). The failure of the district court and the Court of Appeals to apply Kentucky law in this diversity action warrants the granting of petitioner's writ for certiorari. See, *Six Companies v. Joint Highway District*, 311 U. S. 180 (1940).

CONCLUSION

It is therefore, respectfully submitted that the petition for certiorari be granted and the issues herein raised be resolved by this Court by applying Kentucky law to this Kentucky case.

Respectfully submitted,

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